MALAYSIAN REPORTS

GOVERNMENT OF MALAYSIA v. MOHAMED AMIN BIN HASSAN

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C. JJ.) November 1, 1984 and April 30, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 158 of 1984]

Practice and Procedure – Action for damages as result of road accident – Action brought as administrator of estate of deceased on behalf of estate – Application after expiry of limitation period for order to amend the statement of claim by adding plaintiff and his wife in their personal capacity – Addition of new and different party – Whether amendment can be allowed – Subordinate Courts Rules, 1980, O.15 r.1(4).

Interpretation – Statutes – Interpreting words used by legislature – No power to fill in gaps disclosed.

In this case there was a collision between a motor car driven by the respondent and a motor lorry driven by an employee of the appellant. As a result of the accident the son of the respondent who was a passenger in the motor car died and the respondent and his wife, who was also a passenger in the car were injured. The respondent brought an action in the Magistrate's Court at Seremban for damages on the ground of negligence. The action was brought on behalf of the deceased's estate by virtue of section 8 of the Civil Law Act, 1956. Subsequently and after the expiry of the limitation period the respondent applied for an order to amend the statement of claim by adding himself and his wife as plaintiffs in their own personal capacity under Order 15, rule 1(4) of the Subordinate Courts Act, 1980. Leave was granted to add the respondent himself as plaintiff but leave was refused to add his wife. The appellant appealed to the High Court which dismissed the appeal. The appellant further appealed to the Federal Court.

Held, allowing the appeal (Seah S.C.J. dissenting): what the respondent did was not correcting the name of a party. Neither was it a matter of mistake. It was merely the addition of a new and different party. This is not permissible under any provision of the Order 15 rule 1, particularly when the period of limitation affecting the proposed plaintiff had expired.

Cases referred to:

(1) *Braniff* v. *Holland and Hannen and Cubitts (Southern) Ltd & Anor.* [1969] 3 All E.R. 959.
(2) *Brickfield Properties Ltd.* v. *Newton* [1971] 1 W.L.R. 862.
(3) *Lucy* v. *E.T. Henleys Telegraph Works Co. Ltd.* [1970] 1 Q.B. 393.
(4) *Robinson & Ors.* v.*Unicos Property Corporation Ltd.* [1962] 2 All E.R. 24, 26.
(5) *Mabro* v. *Eagle, Star and British Dominions Insurance Co. Ltd.* [1932] 1 K.B. 485.
(6) *Yew Bon Tew & Anor.* v. *Kenderaan Bas Mara* [1983] 1 M.L.J. 1.
(7) *Hilton* v. *Sutton Steam Laundry* [1945] 2 All E.R. 425.
(8) *Davies* v. *Elsby Brothers Ltd.* [1960] 3 All E.R. 672.
(9) *Mitchell* v. *Harris Engineering Company Ltd.* [1967] 2 Q.B. 703.
(10) *Weldon* v. *Neal* (1887) 19 Q.B.D. 394.
(11) *Heaven* v. *Road and Rail Wagons Ltd.* [1965] 2 All E.R. 409; [1965] 2 Q.B. 355.
(12) *Chatsworth Investments Ltd.* v. *Cussins (Contractors) Ltd.* [1969] 1 All E.R. 143, 145; [1969] W.L.R. 1,5.
(13) *Lee Lee Cheng* v. *Seow Peng Kwang* [1958] M.L.J. 271.
(14) *Magor & St. Mellons Rural District Council* v. *Newport Corporation* [1952] A.C. 189, 191.
(15) *Hill* v. *Luton Corporation* [1951] 2 K.B. 387.
(16) *Pontin* v. *Wood* [1962] 1 Q.B. 594.
(17) *Sterman* v. *E.W. & W.J. Moore* [1970] 1 Q.B. 596, 604, 605-606.
(18) *Walkley* v. *Precision Forgings Ltd.* [1979] 2 All E.R. 548.
(19) *Evans* v. *Bartlam* [1937] A.C. 473, 481.

SUPREME COURT.

Lim Beng Choon (Senior Federal Counsel) *(Miss Mary Lim Thian Suan* with him) for the appellant.

Vijay Kumar Natarajan for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo): This appeal is concerned with the construction of Order 15 rule 1(4) of the Subordinate Courts Rules, 1980 which is substantially the same as Order 20 rule 5(4) of the Rules of the High Court, 1980.

The plaintiff/respondent was the father of the deceased, Mohamed Shaiful bin Mohamed Amin, On May 3, 1978 deceased and his mother, Hanah binte Ahmad were passengers in the motor car MD 8589 driven by the respondent. A collision occurred between the motor car and a motor lorry Z7378 driven by 1st defendant, an employee of the 2nd defendant. As a result of the accident deceased died and both his parents suffered injuries. On April 23, 1981 the respondent sued the defendants in the Magistrate's Court at Seremban for damages on the ground of negligence. The statement of claim states clearly that:-

"... he brings this action on behalf of the deceased's estate by virtue of Section 8 of the Civil Law Act 1956 (hereinafter called 'the said Act')."

The defendants denied liability and blamed the respondent for the collision and counterclaimed against him for negligence.

It is not in dispute that the action was filed within the three-year period as prescribed by the Public Authorities Protection Act, 1948. However, on February 9, 1982, after the expiry of the limitation period, the respondent applied for an order to amend the statement of claim by adding himself as 1st plaintiff and his wife as 2nd plaintiff in their own personal capacity under Order 15 rule 1(4) of the Subordinate Courts Rules, 1980. The reason they gave was that their medical reports were not available at the time when the action was filed. It was also said that the action was filed in a representative capacity to save the cause of action from being time-barred. The application was heard by the learned President of the Sessions Court sitting as Magistrate in the Magistrate's Court. Despite objection that the action was time-barred under section 2(a) of the Public Authorities Protection Act, 1948 he gave the respondent leave to add himself as plaintiff but refused leave for the respondent's wife to be added as the 2nd plaintiff. The appellant/2nd defendant appealed. There was also a cross-appeal which was abandoned at the hearing before the learned Judge. Both the appeal and cross-appeal were dismissed. Hence, the present appeal.

At this point it would be convenient to set out the relevant provisions of Order 15 rule 1 of the Subordinate Courts Rules, 1980 as follows:

"Order 15 rule 1

1. (1) Subject to Order 8, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his summons, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraphs (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the summons has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) . . .

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the summons or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

It is the counterclaim of the appellant that the application under Order 15 rule 1(4) ought not to have been allowed on the ground that the lower courts wrongly construed the word "alter" as used in the said Order. The appellant submitted that the respondent was bringing himself in as a party to pursue a claim for his personal benefit. Such a step tantamounts to a joinder of a new party and the addition of a cause of action different from the cause of action of the original plaintiff in the suit. In the circumstances, it was wrong for the learned magistrate to allow the amendment under Order 15 rule 1(4). The provisions of Order 15 rule 1(1), (2) and (4) must be construed strictly as it might affect the question of limitation. Order 8 sets out the special machinery for joinder of parties and joinder of actions. In support of his submission that the learned Judge was wrong to opt for a literal interpretation counsel for the appellant cited *Braniff* v. *Holland & Hannen And Cubitts (Southern) Ltd. & Anor.*[1] and *Brickfield Properties Ltd.* v. *Newton.*[2] The amendment should not have been allowed as it enabled the respondent to circumvent the law. Such an amendment is wrong in law. The personal claim is peculiar to the respondent. Such an amendment, after the limitation period has set in, is not allowed under Order 15 unless it falls within Order 15 rule 1(4). Thus in *Lucy* v. *W.T. Henleys Telegraph Works Co. Ltd.*[3] two applications for amendment made after 12 months when limitation had set in were refused. The two applicants were widows whose husbands died of cancer alleged to have been contracted while in the employment of the defendants some years earlier by exposure to a chemical. The defendant sought to put the blame on I.C.I. and joined them as a third party. In case I.C.I. should be held alone to blame the widows therefore applied to add them as defendants to the action. It was also held that to allow the writs to be amended would deprive I.C.I. of the defence of limitation.

An administrator might institute an action under section 8 of the Civil Law Act, 1956 for the benefit of the estate of a deceased and for the benefit of the dependants under section 7 of the said Act. If an administrator chose to pursue an action for the benefit of the dependants it is said that he is doing so in another capacity. An administrator duly granted the letters of administration who originally chose to initiate an action under section 8 of the said Act and found that he was not a beneficiary could elect to sue under section 7 of the

benefit of himself is permissible under Order 15 rule 1(4). In no sense is the nature of the action altered. See *Robinson & Ors.* v. *Unicos Property Corporation Ltd.*[4]

However, in the present case what the respondent is trying to do is to add himself as plaintiff and pursuing a claim peculiar to himself. That claim is distinct from the claim he instituted as administrator of the deceased's estate. There must be a common link to the claim. Substantially the same argument was made before the learned Judge and *Mabro* v. *Eagle Star and British Dominions Insurance Co. Ltd.*[5] was cited to support the contention that an amendment was not allowed by joining an additional plaintiff. Further, it was submitted that it was not just to allow the amendment. By allowing the amendment the appellant would be deprived of the defence under the Public Authorities Protection Act. In support *Yew Bon Tew And Another* v. *Kenderaan Bas Mara*[6] was cited. On the other hand, the respondent submitted that the respondent was already a party to the action and that *Lucy's* case and *Mabro's* case were distinguishable. The learned Judge so distinguished them when he stated at page 65 of the Appeal Record as follows:

"... In any event *Mabro's* case is clearly distinguishable from our instant case in that in the *Mabro's* case, a different man, who had not sued in the beginning, sought to join the "band-wagon", so to say, later on after the relevant period of limitation had expired, even though he was connected with the original and existing plaintiff in some material way."

Counsel for the respondent says that the respondent is the same person and has the capacity to sue. Also, the relief claimed arises out of the same accident. It is his submission that the respondent falls within Order 15 rule 1(1), (4) and (5). The dispute actually centres round the word "alter" in Order 15 rule 1(4). The appellant contended that Order 15 rule 1(4) should be construed strictly while the learned Judge preferred a liberal interpretation. As to the delay in obtaining the medical report the respondent admitted that there was some delay but it was not inordinate. The medical report was sent to the police in 1980. We were urged to accept that the application was not to extend Order 15 rule 1(1) but one falling within Order 15 rule 1(2) and (4). The appellant rightly pointed out that Order 15 rule 1(5) relied on by the respondent indicated "relief has already been claimed" whereas in the present case there was no such relief in the original claim. The relief only came in after the amendment, by the addition of paragraph 6 to the original statement of claim which reads:-

"6. By reason of the matters aforesaid the deceased was killed and the 1st and 2nd plaintiffs suffered pain and injury and loss and damage."

In *Hilton* v. *Sutton Steam Laundry*[7] leave was refused for the plaintiff to change the capacity in which she sued. She had bound herself to an action in a representative capacity which she did not possess. Also, in the case of *Davies* v. *Elsby Brothers Ltd.*[8] the plaintiff was refused leave to amend the name of "Elsby Brothers" to "Elsby Brothers Ltd." when the former was taken over by the latter. The situation has changed with the operation of the new English Order 20 rule 5(2), (3), (4) and (5) (similar to Order 15 rule 1(1), (2), (3), (4) and (5)). For that reason the learned Magistrate relied on *Mitchell* v. *Harris Engineering Co. Ltd.*[9] In that case in considering the new English Order 20 rule 5(2), (3), (4) and (5) the court granted leave to amend the name of the defendant from "Harris Engineering Company (Leeds) Ltd" to "Harris Engineering Co. Ltd." In his judgment Lord Denning pointed out that the provisions of the new English Order 20 had removed the injustice of the kinds caused by the cases mentioned earlier. He further held that such provision was a most beneficial one, enabling the courts to amend pleadings whenever justice of the case so required.

The approach of the learned Judge was different from that of the learned Magistrate. He considered that it was possible to interpret Order 15 rule 1(4) in two ways, that is, either strictly or liberally. At page 63 of the Appeal Record he stated:

"... The learned Federal Counsel's submission appears to be one of strict interpretation, because if a person alters his capacity, this presupposes that he abandons his former capacity and seeks a new one. A liberal interpretation in my view, however, will mean that so long the self-same person had sued as a party, on the commencement of proceedings and there was any other capacity in which he could have validly sued but had not done so, or had not wanted to do so, or in other words, he might have done so at the time of such commencement of proceedings, he can now sue additionally in that other capacity not utilised earlier, subject to the Court's discretion, of course.

I do not think the present case falls within any provision of Order 15 rule 1. *Weldon* v. *Neal* [10] lays down clearly that a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issuance of the writ have become barred by the Statute of Limita-

tion. It was argued in *Heaven* v. *Road and Rail Wagons Limited*[11] that under the new provisions of Order 20 rule 5 a different situation now prevailed in regard to granting of amendments after the expiry of the period of limitation. However, in Megaw, J.'s view the fact that in certain cases under the English Order 20 rule 5 amendments were to be permitted although the statutory period had run did not mean there was any relaxation of the principle formerly applying under *Weldon* v. *Neal.* Lord Denning, on the other hand, took a different view. In *Chatsworth Investments, Ltd* v. *Cussins (Contractors) Ltd.*[12] he stated as follows:

"... Since the new rule, I think we should discard the strict rule of practice in *Weldon* v. *Neal*[10] . The courts should allow an amendment whenever it is just so to do, even though it may deprive the defendant of a defence under the Statute of Limitations ..."

Expressing that he favoured the approach of Megaw, J. and was unable to agree with the *dictum* of Lord Denning in *Braniff's* case, Widgery L.J. went on at page 963 to say:

"... I find it very difficult to think that, when specific exemption is made in R.S.C., Ord. 20, r.5(3), (4) and (5), in cases where the statute has run it is then legitimate to interpret the rule as making similar provision available and similar excuses available in cases which are not within the precise terms of those three paragraphs."

What Widgery, L.J. said applies with equal force to similar provisions under Order 15 rule 1 of the Subordinate Courts Rules, 1980 and Order 20 rule 5 of the Rules of the High Court, 1980.

The *Shorter Oxford English Dictionary* defines "alter" to mean "to make otherwise or different in some respect, without changing the thing itself, to modify." In *Stroud's* Judicial Dictionary 4th edn. Volume 1 "alter", *inter alia*, means

"The power to alter, modify, or extend a plaintiff's claim by his statement of claim (R.S.C. Ord. 18 r.15) does not authorise a totally different case from that set up by the writ (*Ker* v. *Williams*, 30 S.J. 238: *Cave* v. *Crew*, 62 L.J. Ch. 530), or the joining of a cause of action not mentioned in the writ (*United Telephone Co.* v. *Tasker*, 59 L.T. 852)."

It is interesting to note that the Privy Council in *Yew Bon Tew & Anor.* v. *Kenderaan Bas Mara* at page 6 stated:

"... The only other comment which their Lordships would make on the decision in the *Mitchell* case[9] is that they do not accept the generality of the proposition stated by the learned Master of the Rolls that:-

'The Statute of Limitations does not confer any right on the defendant. It only imposes a time limit on the plaintiff.'

In the opinion of their Lordships an accrued entitlement on the part of a person to plead the lapse of a limitation period as an answer to the future institution of proceedings is just as much a 'right' as any other statutory or contractual protection against a future suit."

The learned Judge thought that *Mabro's* case might be differently decided now under the provisions of the English Rules of the Supreme Court, 1965, similar to our Order 15 rule 1 on ground of genuine mistake. I would refer to *Lucy's case* where Megaw, L.J. observed as follows:-

"I did not understand counsel for the plaintiff to contend that *Mabro's* case was wrong. Let it be accepted, however, that, since it was a decision of a court consisting only of two members, Scrutton L.J. and Greer L.J., it is not binding on this court. So far as I am aware, the principle enunciated in that case has never been challenged; and with all respect, I think the principle is right, as much as it was 37 years ago..."

He then referred to the recent changes of the Rules of the Supreme Court and considered that there was no basis for suggesting that the authority of *Mabro's* case was affected. He continued in these words which aptly apply to the situation in the present case:

"The recently introduced provisions of R.S.C. Ord. 20 r.5 – expressed to be subject to Ord. 15, rules 6, 7 and 8 – do not, in my view, help the plaintiff. On the contrary, they confirm by inference that, in a case such as the present, there is no power in the court to amend the writ in the manner asked. Paragraph (2) of that rule provides that a court may allow a party to amend the writ 'after any period of limitation current at the date of the issue of the writ has expired', but this is expressly confined to the cases mentioned in paragraphs (3), (4) and (5) of the rule. Paragraph (3) provides that an amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment is to substitute a new party; but this power is explicitly confined to an amendment to correct the name where there is a genuine mistake which it is sought to correct. The addition of a new and different party is not correcting the name of a party; it is not a matter of mistake. The inference is inevitable that an amendment to add a completely new and different defendant is not permissible where a relevant period of limitation affecting the proposed defendant has expired."

What the respondent did was not correcting the name of a party. Neither was it a matter of mistake. It was merely the addition of a new and different party. This is not permissible under any provision of the Order 15 rule 1, particularly when the period of limitation affecting the proposed plaintiff had expired. This is not a case of altering a party suing in his representative capacity into his personal capacity. It is a case of adding a new party to the original suit. For that very reason the learned

magistrate rightly refused to grant leave to Hanah binte Ahmad to be made the 2nd plaintiff. What special reason is there to differentiate the case of the respondent. It is merely a coincidence that he sued in a representative capacity. Clearly the court has no power to resuscitate an action which must fail *in limine* upon a plea of limitation. See *Lee Lee Cheng* v. *Seow Peng Kwang.*[13]

The learned Judge was very much influenced by the facts that the respondent was already a party in his representative capacity on the commencement of the proceedings and that he could also validly sue in his personal capacity if he wanted to at the time. He did not do so until he had obtained his medical report, a considerable time later. Nevertheless, the learned Judge was of the view that by means of a liberal interpretation of Order 15 rule 1(4) the respondent could by amendment be added as a party in his personal capacity. With respect to the learned Judge whose judgments are always well thought out, I must say that I am not aware of any authority which allows the addition of a party in such circumstances as to defeat the defendant of his defence under the Statute of Limitation. All the English cases cited show that the amendments were allowed to correct the name of a party (Order 20 rule 5(3) or to alter the capacity in which the party sues or is sued (Order 20 rule 5(4) or to add or substitute a new cause of action (Order 20 rule 5(5)). The learned Judge was quite aware that the provisions of Order 15 rule 1 and similar provisions in the Rules of the High Court, 1980 confer express and unmistakeable powers which apply only to those special circumstances within the scope of these provisions which could not have been intended to prejudice or remove *en masse* the right or benefit conferred by any Statute of Limitation.

In the matter of construction it is well to remember that in *Magor & St. Mellons Rural District Council* v. *Newport Corporation*[14] the House of Lords has laid down clearly that in construing a statute the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. To do so would be to usurp the function of the legislature. In that case Lord Simonds made this important observation:–

"The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited ..."

The court should not try to extend the provisions of Order 15 rule 1 beyond their natural and proper limit in order to supply omissions or defects nor strain them to the justice of an individual case.

Halsbury's Laws of England, 3rd Edition, Volume 24, page 201, paragraph 358 has this to say:

"The court will refuse to allow a writ to be amended by the addition of a party when the effect of the amendment will be to defeat the operation of the statute. If a writ has been amended, the original writ, not the amendment, is the commencement of the action.

The issue of a writ in one action, before the expiration of the statutory period, only keeps alive the cause of action in the action in which it was issued, and if another action for the same cause is commenced after the expiration of the statutory period, the second action will be barred."

For reasons given I would allow the appeal. Costs to the appellant here and the courts below. Deposit to be refunded to the appellant.

Seah S.C.J. *(dissenting):* The facts leading to this appeal are set out in full by the learned the Chief Justice in his judgment and I need not repeat them here.

It is common ground that Order 15 rule 1 of the Subordinate Courts Rules 1980 are substantially the same as Order 20 rule 5 of the Rules of the High Court 1980 which in turn are taken from Order 20 rule 5 of the English Rules of the Supreme Court 1965 which came into operation in England on January 1, 1965. For the purpose of this appeal I would be referring to pre and post 1965 cases regulating the practice of the courts in England on the question of amendment to the writ and pleading made after the period of limitation.

With regard to the pre-1965 period the relevant order and rules of the Supreme Court in England were Order 28 rule 1 and rule 12. Under these rules the practice of the courts was laid down by *Weldon* v. *Neal.*[10] It was held there that a plaintiff would not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ had become barred by the Statute of Limitations. This practice of the courts had been consistently followed and acted upon by the courts in England and in this country. However, in *Hill* v. *Luton Corporation*[15] and *Pontin* v. *Wood*[16] the English courts attempted to extricate themselves from this rigid rule of practice without much success. When the English Rules of the Supreme Court were revised in 1962

opportunity was taken to try to alter that portion of the rules relating to amendment of the writ and pleading, in order to remove the injustice and hardship caused by the rule of practice in the exercise of the discretionary power of the court. And the present Order 20 rule 5 is the result of such change. The relevant part is para. 2 of rule 5 which reads:

"Where an application to the Court for leave to make the amendment mentioned in paragraphs (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so."

An attempt to argue that the change was beyond the powers of the Rule Committee was unanimously rejected by the Court of Appeal in *Mitchell* v. *Harris Engineering Co. Ltd.*

Instead of effecting a smooth change it seems to me that the new Order 20 rule 5 has given rise to some problems in interpreting it. On the one hand, there was the view of the former Master of the Rolls, Lord Denning. In *Chatsworth Investments Ltd.* v. *Cussins (Constructors) Ltd.* the learned Master of the Rolls said:

"The new RSC Order 20 rule 5(a), (3), (4) and (5) has specifically overruled a series of cases which worked injustice. Since the new rule, I think we should discard the strict rule of practice in *Weldon* v. *Neal (supra).* The courts should allow an amendment whenever it is just to do so, even though it may deprive the defendant of a defence under the Statute of Limitation..."

Lord Denning M.R. reiterated that view of liberal interpretation in *Sterman* v. *E.W. & W.J. Moore*[17] at page 604:

"The new rules, it is said, have cut down the power to amend. You can only amend a writ, it is said, so as to avoid the Statute of Limitations, if the case can be brought expressly within Order 20, Rule 5, sub-rules (2), (3), (4) and (5): and that otherwise it is a strict rule of the court that no amendment can be allowed which would deprive a defendant of the benefit of the Statute of Limitations. Support for this interpretation of Order 20, Rule 5 is given by the recent case in this court of *Braniff* v. *Holland & Hannen and Cubitts (Southern Ltd.* ([1969] 2 W.L.R. 1533). But I must say that I cannot agree with it. If this restrictive interpretation were given to Order 20, Rule 5, we should be once again allowing genuine claims to be defeated by technical defects. I think we should give full effect to the wide words of Order 20, Rule 5(1). We should not cut them down by reference to sub-rules (2), (3), (4) and (5)..."

The view of liberal interpretation opined by the former Master of the Rolls was supported by Salmon and Cross L.JJ. in the same case at pages 605 – 606.

Sachs L.J. expressed similar view in the case of *Brickfield Properties Ltd.* v. *Newton.*[2]

On the other hand, the position taken by Megaw J. is to give the new Order 20 rule 5 a strict construction. In *Heaven* v. *Road & Rail Wagons Ltd.* Megaw J. (as he then was) took the view that the fact that in certain cases under Order 20 rule 5 amendments were to be permitted although made after the statutory period did not mean that in general there was any relaxation of the principle formerly applying under *Weldon* v. *Neal (supra).* The approach of Megaw J. seems to be supported by Widgery L.J. in the case of *Braniff* v. *Holland & Hannen & Cubitts Ltd.*[1] At page 963 the learned Lord Justice said:

"I respectfully agree with that approach. I find it very difficult to think that, when specific exemption is made in RSC Order 20 rule 5(3), (4) and (5) in cases where the statute has run it is then legitimate to interpret the rule as making similar provision available and similar excuses available in cases which are not within the precise terms of those three paragraphs.

Accordingly, I find myself, with respect and deference, unable to agree with the dictum of Lord Denning M.R. in a later case, *viz. Chatsworth Investment Ltd.* v. *Cussins (Contractors) Ltd. (supra)* ... I, for my part, prefer the approach of Megaw J. on the matter."

With regard to these conflicting judicial opinions I need only say that they are not and have never been binding on us albeit they are entitled to respect and are of persuasive value.

I come now to deal specifically with the new Order 20 rule 5 which however, contains five paragraphs.

In my opinion, rule 5(1) confers on the Court a discretion to amend the writ or pleading in general for purpose of determining the real questions in controversy between the parties or issues raised in the proceedings on such terms as to costs or otherwise as may be just and in such manner (if any) as the Court may direct. This paragraph (1) appears to summarise the power of the Court formerly contained in Order 28 rule 1 and 12 of the pre-1965 Rules.

Rule 5(2) is new and appears to be inserted to effect a change in the former practice of the Court fettered by the rule of *Weldon* v. *Neal (supra).* Paragraph (2) reads:

"Where an application to the Court for leave to make the amendment mentioned in paragraphs (3), (4) or (5) is made after any relevant period of limitation current at the date of

issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so."

In my opinion, paragraph (2) now gives to the the Court a discretionary power to allow an amendment albeit it is made after the expiry of the limitation period if, and only if, the special circumstances defined in paragraphs (3), (4) or (5) exist and further if the Court is of the view that the justice of the case requires it. In other words, when an application to amend is now made after the statutory period, the questions to be considered by the Court are:

(a) whether the application comes within paragraphs (3), (4) or (5)?

(b) if the answer to (a) is in the affirmative, whether it is just to allow the amendment having regard to the particular circumstances of the case?

In dealing with (b) reference may be made to the case of *Walkley* v. *Precision Forgings Ltd.*[18] That was a case where application was made to override the time limit under section 2D(1) of the English Limitation Act 1939 and the application was refused because the appellants no longer occupied the premises at which the respondent had been employed; the works manager had in the meantime died; so had the senior group medical officer (*per* Lord Diplock at page 556F). The test to be adopted appears to be a subjective one having regard to the circumstances of the case. Such an approach, in my opinion, seems to be in accord with the new Order 20 rule 5. To hold otherwise, would in the words of Lord Russell of Killowen in *Evans* v. *Bartlam*[19] "be adding a limitation which the rule does not impose."

However, in construing paragraphs (3), (4) or (5) thereof I am of the view that the words used therein ought not to be given a strict and rigid construction. These three paragraphs which form the backbone in the exercise of the discretionary power of the Court contained in paragraph (2) should be given a generous and liberal interpretation to bring it in line with the changes to avoid injustice and/or hardship.

I would now deal with the facts of this case giving rise to this appeal.

The respondent, who is plaintiff in the Magistrate's Court, is the father of the deceased, Mohamed Shaiful bin Mohamed Amin. On May 3, 1978 the deceased and his mother, Hanah binti Ahmad were passengers in a motor car MD 8589 driven by the respondent. A collision took place between the said motor-car and a motor lorry Z7378 driven by the 1st defendant, an employee of the appellant (2nd defendant in the Court below). As a result of the accident the deceased died and both his parents suffered injuries. On April 23, 1981 the respondent sued the 1st defendant and the appellant in the Magistrate's Court for damages for negligence as administrator of the deceased's estate under section 8 of the Civil Law Act 1956 (hereinafter called the Act). Liability is denied and the respondent was blamed for the collision. There is also a counterclaim against the respondent.

After the expiry of the period of limitation under the Public Authorities Protection Act 1948 the respondent applied to amend the statement of claim by adding himself as the 1st plaintiff and his wife as the 2nd plaintiff in order to sue in their own personal capacity under Order 15 rule 1(4) of the Subordinate Courts Rules 1980. Despite objection that the proposed amendment would be time-barred under section 2(a) of the Public Authorities Protection Act 1948 the Magistrate's Court gave the respondent leave to add himself as 1st plaintiff but refused leave to the wife to be added as the 2nd plaintiff. The appellant appealed to the High Court and it was dismissed. There was a cross-appeal against the refusal to allow the wife to be added as the 2nd plaintiff but this was abandoned and it was similarly dismissed. In dismissing the appeal of the appellant the learned Judge said at page 63 of the Appeal Record:

"... The learned Federal Counsel's submission appears to be one of strict interpretation, because if a person alters his capacity, this presupposes that he abandons his former capacity and seeks a new one. A liberal interpretation in my view, however, will mean that so long the self-same person had sued as a party, on the commencement of proceedings and there was any other capacity in which he could have validly sued but had not done so, or had not wanted to do so, or in other words , he might have done so at the time of such commencement of proceedings, he can now sue additionally in that other capacity not utilized earlier, subject to the Court's discretion, of course."

I would adopt what has been said by the learned Judge with regard to the construction of the word "alter" in paragraph (4) thereof. In my opinion, the word "alter" ought to be reasonably understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the rule has authorized ought not (unless expressly prohibited) to be held by judicial construction, to be outside its application.

To do so would seem to defeat the purpose of the introduction of Order 20 rule 5(2).

At the time when the respondent took out the summons against the 1st defendant and the appellant as administrator of the deceased's estate under section 8 of the Act it cannot be disputed that the respondent might have also sued them in his personal capacity for damages on the ground of negligence at common law. (See Order 8 rule 1(1)(b) of the Subordinate Courts Rules 1980. Order 15 rule 1(5) of the Subordinate Rules 1980 makes it clear that "An amendment may be allowed under paragraph (2) *notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment* (the words italicized are mine)" It seems to follow that the respondent had brought his case under Order 15 rule 1(4) read with Order 15 rule 1(5) of the Subordinate Courts Rules 1980. Since the wife was not a party to the original suit the Magistrate's Court was right, in my opinion, to refuse the application. Having ruled that Order 15 rule 1(4) and 1(5) had been complied with the next question to consider was whether the Court thinks it just to allow the amendment albeit it was made after the statutory period. Both the Magistrate's Court and the High Court are of the opinion that the justice of the case require it and since the learned Senior Federal Counsel had failed to show us that both Courts below had erred in the exercise of their discretionary power, I would be reluctant to interfere. For the above reasons I would dismiss the appeal with costs to the respondent.

Syed Agil Barakbah S.C.J.: This appeal relates to the main question whether an amendment should be allowed to add a second plaintiff and a new cause of action to the writ and statement of claim after the lapse of the statutory period of limitation. It is an important point of law and procedure. The relevant provision is Order 15 rule 1 (4) of the Subordinate Courts Rules 1980 which is substantially the same as Order 20 rule 5(4) of the Rules of the High Court 1980. The Magistrate who first heard the application gave the respondent leave to amend notwithstanding the objection that the action was time-barred under section 2(a) of the Public Authorities Protection Act 1948. The Judge on appeal agreed with the decision of the Magistrate and dismissed the appeal. The appellant being dissatisfied has brought the present appeal before this Court.

I have had the advantage of reading the judgments of Lee Hun Hoe, C.J. (Borneo), and George Seah, S.C.J., both of which cover quite in detail the background of the case, the relevant provisions of the law and the authorities in support of their respective conclusions. In view of the conflicting decisions, I have to give my own without the necessity of repeating the facts and circumstances of the case.

Order rule 1(1) gives discretionary power to the Court to allow any party to amend his pleading on such terms as to costs or otherwise as it thinks just. It is subject to Order 8 rules 6, 7 and 8 and to the provisions of rule 1 paras. (2) to (5). Para (2) empowers the Court to allow an application for amendment made after the expiry of the limitation period subject to the provisions formulated in paras. (3), (4) and (5), if it thinks just to do so. Thus, para. (3) enables amendment to be made to *correct the name of a party* even though such amendment will result in substituting a new party so long as the Court is satisfied that the mistake is genuine and not misleading. Para. (4) allows the Court *to alter the capacity* in which a party sues by way of amendment, whether as plaintiff or defendant by counter claim, as long as the party might have sued in the new capacity at the date of the issue of the summons. Finally, para. (5) empowers the Court to allow amendment *to add or substitute a new cause of action* if such cause of action arises out of the same or substantially the same facts as the existing cause of action on which relief has already been claimed by the party applying for leave to amend. In short, the amendments allowable at paragraph (2) as specified in paras. (3), (4) and (5) relate to curing specified defects in the writ or pleading and not to other defects which are outside their scope. To that extent, it has taken a substantial step away from the harsh rule in *Weldon* v. *Neal*.[10] The circumstances as specified however have not imported any relaxation of the former principle governing the power to allow such amendments. This view of Megaw J. in *Heaven* v. *Road and Rail Wagons, Ltd.*[11] is reinforced by Widgery L.J. in *Braniff* v. *Holland & Hannen and Cubitts*.[1] Rule 1(1) may be wide, but in my view does not cover a case where the period of limitation has expired. The real point is whether the present appeal falls under para. (4).

I would construe the rule by adopting the ordinary canon of construction and by giving the words their proper and natural meaning in accord-

ance with the intention of legislature. It is to be noted that the requirement with regard to pleading a time bar under the statute of limitation which is acquired after the lapse of the statutory period is an accrued right, even though it arises under an Act which is procedural. Lord Brightman when considering this point in the Privy Council in *Yew Bon Tew & Anor.* v. *Kenderaan Bas Mara*[6] did not agree with the generality of the proposition stated by Lord Denning M.R. in *Mitchell* v. *Harris Engineering Co. Ltd.*[9] that the statute of limitation does not confer any right on the defendant, but it only imposes a time limit on the plaintiff. He was of the opinion that an accrued entitlement on the part of a person to plead the lapse of limitation period as an answer to future proceedings is just as much a "right" as against any statutory or contractual protection against a future suit. I agree and adopt this principle. In my view, Order 15 rule 1 must be construed in the light of this important principle.

I read the words "to alter the capacity" in paragraph (4) to mean to modify or substitute the capacity and does not extend to add to the capacity in which the party has sued. If an amendment is allowed to add a party to the writ, it will amount to adding a new party apart from adding a new cause of action. What the Magistrate's Court did in the present case was to allow amendment by allowing the respondent who was already suing as the plaintiff in the representative capacity to be added as the second plaintiff in his personal capacity after the expiration of the limitation period. That, in my opinion, violates the statutory limitation because it takes away the accrued right of the appellant to plead the lapse of limitation period. Secondly, I do not think it is the intention of legislature to allow such amendment at that stage. It is not a technical defect because it introduces a new party to the action and leave to amend should have been applied for prior to the expiry of the statutory period of limitation.

A similar situation arose in *Braniff* v. *Holland* (*supra*). It was an application to amend the writ to include the second defendant after the statutory period of limitation has expired. Originally the plaintiff sued the first defendant for damages in respect of injuries he had sustained while working as an employee of the first defendant. At first, the first defendant applied for leave to issue third party notice against the second defendant claiming indemnity against any damages which might be awarded, but that was refused by the Master. Subsequently, by mutual arrangement between the plaintiff and the first defendant, the plaintiff applied for leave to amend the writ and statement of claim by joining the second defendant. The application was allowed, but subsequently on appeal by the second defendant the writ was set aside on the ground that the period of limitation has expired when the plaintiff's application was made. The appeal to the Court of Appeal was also dismissed.

The *ratio decidendi* was that as conceded by counsel for the plaintiff with whom Widgery L.J. agreed, the case did not come within paragraphs (3), (4) and (5) of the rule which are the directly relevant paragraphs when considering amendments made after the expiry period of limitation. I am of the view that the case before me is in the same category. It has not come within the ambit of paragraph (4), and for that matter under paragraphs (3) or (5). It is therefore not just to grant leave to amend.

For these reasons, I would allow the appeal with costs.

Appeal allowed.

Solicitors: *Albar, Zulkifli & Yap.*

YII SUOK TING v. SIBU MUNICIPAL COUNCIL

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) May 6 & September 12, 1985]

[Kota Kinabalu – Supreme Court Civil Appeal No. 24 of 1985]

Administrative Law – Application for orders of mandamus and certiorari – Permit issued by Municipal Council – Allegation that Municipal Council through its Deputy Chairman had not acted fairly – Evidence by affidavit – Application to cross-examine Deputy Chairman – Appeal against refusal – R.H.C. 1980, O.38 r.2(3).

In this case the appellant had applied for orders of mandamus and certiorari against the respondent council. In her affidavit in support of the application the appellant alleged, *inter alia*, that the respondent through its Deputy Chairman had not acted fairly towards her, in refusing to renew her permit to trade. The Deputy Chairman of the respondent council in his affidavit in opposition challenged the allegations of the appellant against the respondent as to the grounds relating to the non-renewal of the appellant's permit to trade. The appellant applied for an order requiring the attendance of the Deputy Chairman for cross-examination. This was refused. The appellant appealed.